Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
BellSouth's Petition for Declaratory Ruling Regarding the Commission's Definition of Interconnected VoIP in 47 C.F.R. § 9.3 and the Prohibition on State Imposition of 911 Charges on VoIP Customers in 47 U.S.C. § 615a-1(f)(1)	)	WC Docket No. 19-44
	)	
Petition for Declaratory Ruling in Response to Primary Jurisdiction Referral, Autauga County Emergency Management Communication District et al. v. BellSouth Telecommunications, LLC, No. 2:15-cv-00765-SGC (N.D. Ala.)	)	

COMMENTS OF WINDSTREAM SERVICES, LLC

Thomas W. Whitehead
WINDSTREAM SERVICES, LLC
1275 K Street, NW, Suite 350
Washington, DC 20005
(202) 223-7668

March 28, 2019

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of BellSouth's Petition for Declaratory Ruling Regarding the Commission's Definition of Interconnected VoIP in 47 C.F.R. § 9.3 and the Prohibition on State Imposition of 911 Charges on VoIP Customers in 47 U.S.C. § 615a-1(f)(1) Petition for Declaratory Ruling in Response to Primary Jurisdiction Referral, Autauga County Emergency Management Communication District et al. v. BellSouth Telecommunications, LLC, No. 2:15-cv-00765-SGC (N.D. Ala.)	)	WC Docket No. 19-44

COMMENTS OF WINDSTREAM SERVICES, LLC

I. INTRODUCTION AND SUMMARY

Windstream Services, LLC ("Windstream"), hereby submits comments in response to petitions for declaratory ruling of BellSouth Telecommunications, LLC ("BellSouth")[1] and the Alabama 911 Districts of Autauga County, Calhoun County, Mobile County, and the City of Birmingham (collectively, the "Alabama Districts").[2] The Commission should grant the

[1] *BellSouth's Petition for Declaratory Ruling Regarding the Commission's Definition of Interconnected VoIP in 47 C.F.R. § 9.3 and the Prohibition on State Imposition of 911 Charges on VoIP Customers in 47 U.S.C. § 615a-1(f)(1)*, BellSouth Communications, LLC's Petition for Declaratory Ruling (filed Jan. 7, 2019) ("BellSouth Petition").

[2] *Petition for Declaratory Ruling in Response to Primary Jurisdiction Referral, Autauga County. Emergency Management Communication District et al. v. BellSouth Telecommunications, LLC, No. 2:15-cv-00765-SGC (N.D. Ala.)*, Petition of the 911 Districts of Autauga County, Calhoun County, Mobile County, and the City of Birmingham Regarding the Meaning and Application of the Definition of Interconnected VoIP Service Set Forth in 47 C.F.R. § 9.3 (filed Jan. 29, 2019) ("Alabama Districts' Petition").

BellSouth Petition and deny the Alabama Districts' Petition. A finding in favor of the Alabama Districts would be contrary to good public policy and federal law, and could disrupt the contractual interests of service providers and their customers. Underlying these concerns is the practical effect of the petitions: their resolution will have a significant impact on the amounts that customers throughout the country pay for telecommunications and, as a result, the desirability of next-generation IP-enabled services.

Although the petitions arise out of a single case in Alabama,[3] their two related issues—(1) the classification of voice over internet protocol ("VoIP") services under federal law and the state's 911 statute and (2) the preemptive effect of federal law on the assessment of 911 charges—are not unique to Alabama. Indeed, Windstream and several of its subsidiaries are involved in litigation concerning these or similar issues in 27 different jurisdictions.[4] Hundreds of telecommunications providers are joined in these lawsuits or related ones.

In each lawsuit, however, the governmental entities or private *qui tam* relators filing on their behalf all have the same goal: increasing revenues from 911 charges. Nearly all use the same two improper methods for reaching that goal. First, they discriminate against VoIP customers by treating them differently than identically situated non-VoIP customers—e.g., customers receiving a time-division multiplexing/primary rate interface (TDM/PRI) service. In short, they subject VoIP customers to higher 911 charges. The VoIP customers are assessed a

[3] *Autauga County Emergency Management Communication District, et al. v. BellSouth Telecommunications, LLC*, Docket No. 2:15-cv-00765-SGC, Order, at 9 (Mar. 2, 2018 N.D. Ala.) ("Primary Jurisdiction Referral").

[4] *See* Appendix. Two of these lawsuits (the Florida action and the Allegheny County action) have been stayed pending the Commission's resolution of this proceeding. Windstream and its subsidiaries are also defendants in several sealed proceedings, are subject to ongoing audits and investigations in other jurisdictions, and were defendants in several resolved matters, including several proceedings resolved through court dismissals.

charge on every phone number (regardless of how many simultaneous 911 calls can be made, which is the historical basis for the charge assessment), whereas the non-VoIP customers are assessed a charge based on simultaneous calling capability (regardless of how many phone numbers they have). So, for example, if a VoIP and a non-VoIP customer each have 100 phone numbers but can only make 23 simultaneous 911 calls (for technological or other reasons), they are nonetheless assessed different 911 charges—the VoIP customer pays 100 charges, while the non-VoIP customer pays 23 charges. Second, the governmental entities and *qui tam* relator misclassify traditional, non-VoIP services (e.g., TDM/PRI) as VoIP services. This misclassification is motivated, of course, by the fact that they also claim that VoIP services should be assessed greater 911 charges.

The states' charge-assessment methods create three principal problems.

First, they create a perverse incentive to divert 911 charges, which is a longstanding problem faced by the Commission. Unsurprisingly perhaps, several states that are known to have diverted charges are involved in the ongoing lawsuits against Windstream and others. If the Commission denies the BellSouth Petition and accepts the Alabama Districts' claims, those same states would be free to collect *much* higher charges and continue to divert them, effectively siphoning money out of consumers' pockets under false pretenses and for any number of uses. Indeed, as BellSouth points out, Roger Schneider and his company, Phone Recovery Services, LLC (a *qui tam* relator involved in many of the lawsuits related to this proceeding) stand to receive a substantial pecuniary benefit in the form of contingency fees if the plaintiff jurisdictions can collect significant additional 911 charges by following Schneider's theories.[5]

[5] BellSouth Petition at 1.

These are monies that would otherwise go to the jurisdictions but instead are going into the pocket of a private citizen and his company.

Second, by discriminating against VoIP customers, the states' methods discourage the transition to IP-enabled services—a transition which the Commission has long promoted. Congress followed the Commission's lead and sought to limit the harmful impact of technology-banded regulations when it codified the Commission's *VoIP 911 Order* in 2008.[6] Yet technology-banded laws are the driving force of the 911 lawsuits throughout the country. A clear statement from the Commission that states must apply 911 charges in a nondiscriminatory manner—that is, on a technologically neutral basis that applies equally in all respects to both VoIP and non-VoIP services—would put an end to nearly all of the 911 lawsuits. Such a statement would also eliminate the governmental entities' desire to misclassify traditional services as VoIP services. Consistent with the BellSouth Petition, the Commission should find that any state statute "requir[ing] interconnected VoIP customers to pay a higher total amount in 911 charges than customers purchasing the same quantity of non-VoIP telephone service" is preempted.[7]

Third, in misclassifying traditional phone services, the states rely on a concept unrelated to VoIP technology—the demarcation point—to redefine VoIP services. To the extent that the Commission chooses to clarify the scope of services that fall within its definition of "interconnected VoIP,"[8] it should find that the service ordered by the customer (and delivered to

---

[6] *See* 47 U.S.C. § 615a-1(f)(1); *see also IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, WC Docket No. 04-36, WC Docket No. 05-196, FCC 05-116 (rel. June 3, 2005).

[7] BellSouth Petition at 24.

[8] *See* 47 C.F.R. § 9.3.

the customer's premises to a point at which the customer can access those services) controls. The Commission should further determine that, where an agreement between the service provider and its customer limits the number of possible simultaneous calls, the agreement should control the number of access lines on which 911 fees may be assessed.

II. WINDSTREAM'S POSITIONS

A. Granting the Alabama Districts' Petition Would Exacerbate the Diversion of 911 Charges.

The diversion of 911 charges is a substantial and growing issue. In recent remarks, Chairman Pai pointed out that, in 2017, six states and one territory diverted $285 million for non-911-related purposes.[9] Over the same period, only $199 million from 911 charges was spent on next-generation 911 across all states.[10] Chairman Pai underlined the problem: "When more 911 fees are going to non-911 purposes than to the deployment of the next generation of 911 technologies, that's *an outrage*."[11] The total amount of diverted charges actually grew by almost $155 million between 2016 and 2017. In a 2018 letter regarding the 2016 findings, Commissioners O'Rielly and Rosenworcel called the practice "deceptive" and "harmful for public safety."[12] In 2016, seven states had refused to respond to the Commission's survey.[13]

---

[9] Ajit Pai, Chairman, FCC, Remarks at "911 Goes to Washington," at 3 (Feb. 15, 2019), https://docs.fcc.gov/public/attachments/DOC-356239A1.pdf ("Pai Remarks").

[10] *Id.*

[11] *Id.* (emphasis added).

[12] Letter from Michael O'Rielly and Jessica Rosenworcel to Republican and Democratic Governors Associations re: 911 Fee Diversion, at 1 (July 31, 2018), https://docs.fcc.gov/public/attachments/DOC-353114A1.pdf.

[13] *Id*. For the 2017 reporting year, all states and territories responded, which may explain why the volume of diverted fees grew. *Tenth Annual Report to Congress on State Collection and*

Many of the same states that the Commission has "called out" for 911 charge diversion are involved in lawsuits that could be affected by the outcome of this proceeding. For example, Windstream and its subsidiaries are named in lawsuits brought in New Jersey and Rhode Island—both of which diverted 911 charges for "non-public safety or unspecified uses" in 2017.[14] Rhode Island, in particular, simply moved the money to the general treasury.[15]

So far, shaming these states into compliance has not worked.[16] If the Commission denies the BellSouth Petition and accepts the Alabama Districts' claims, those jurisdictions would receive substantially more money to divert for non-911-related purposes. The resulting windfall would be carried on the backs of consumers under the false pretense that the charges are being used to enable next-generation 911. The apparent motivation of many plaintiff jurisdictions in matters similar to the underlying litigation in this proceeding must not be overlooked.

B. Granting the Alabama Districts' Petition Would Discourage the Adoption of VoIP Services.

1. The Commission has long encouraged the adoption of VoIP services.

Granting the Alabama Districts' Petition would also have the perverse consequence of discouraging the adoption of next-generation IP-enabled voice services. Commissioners from both parties have long sought to encourage the deployment of IP-enabled services. In 2013, Chairman Wheeler called the IP transition "a good thing" and wrote that "[h]istory has shown

---

Distribution of 911 and Enhanced 911 Fees and Charges, at para. 2 (Dec. 17, 2018), https://www.fcc.gov/file/14980/download.

[14] *Id.*; *see also* Appendix at 2.

[15] *Id.* ("New York, Montana and Rhode Island transferred 911/E911 fees to their general funds.").

[16] Pai Remarks at 3.

that new networks catalyze innovation, investment, ideas, and ingenuity. Their spillover effects can transform society . . . ."[17] Chairman Pai has called the "all-IP world . . . more resilient, more robust, and more competitive [than legacy copper networks]."[18] Throughout his career, Chairman Pai has sought to "expedite the IP Transition [and to] end the burdensome regulations that tie up carrier resources and slow the deployment of next-generation networks."[19]

The Commission's 2016 *Tech Transitions Order* "updated its rules to help ensure that consumers, industry and the economy reap the benefits of this ongoing, innovative transformation."[20] In 2017 and 2018, the Commission took further steps to enable the transition to IP-based services.[21] Deciding in favor of the Alabama Districts' argument that VoIP 911

---

[17] Tom Wheeler, Chairman, FCC, *The IP Transition: Starting Now* (Nov. 19, 2013), http://www.fcc.gov/blog/ip-transition-starting-now.

[18] Statement of Chairman Pai, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, WC Docket No. 17-84, at 1 (rel. Nov. 29, 2017), https://ecfsapi.fcc.gov/file/112953288236/FCC-17-154A2.pdf.

[19] Statement of Commissioner Pai, *Technology Transitions, USTelecom Petition for Declaratory Ruling that Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers*, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, GN Docket No. 13-5, WC Docket No. 13-5, RM-11358, at 1 (rel. July 15, 2016), https://docs.fcc.gov/public/attachments/DOC-340303A5.pdf.

[20] *FCC Streamlines Approval Process for Network Technology Transitions*, FCC Press Release (July 14, 2016), https://docs.fcc.gov/public/attachments/DOC-340303A1.pdf.

[21] *See generally Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, WC Docket No. 17-84 (rel. Nov. 29, 2017); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WC Docket No. 17-84, FCC 18-74 (rel. June 8, 2018); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third

charges may be assessed on a per-phone number basis would "turn back the clock" and effectively introduce a novel, costly, and innovation-stifling distinction between voice services delivered over copper-based technologies (such as TDM) and VoIP.

2. By preventing increased charges for VoIP services, the preemptive effect of 47 U.S.C. § 615a-1(f)(1) encourages adoption of VoIP services by treating them in a technologically neutral manner.

Congress has made clear that "[f]or each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services."[22]

BellSouth's interpretation of this language is the only reasonable one and would therefore be valid under *Chevron*, should the Commission choose to adopt it. Bearing in mind the federal policy of encouraging next-generation services, this language can only reasonably be read to limit the *total* fees or charges associated with VoIP services to the *total* amounts imposed on other telecommunications services. The Commission should therefore determine that state statutes imposing higher total 911 charges on interconnected VoIP services than other telecommunications services are unlawful under 47 U.S.C. § 615a-1(f)(1).

The Alabama Districts nonetheless contend that a House Report on the bill enacting this provision supports their interpretation,[23] but the cited discussion is actually from a cost estimate provided by a Congressional Budget Office staffer.[24] In any event, the discussion more

---

Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, FCC 18-133 (rel. Sept. 27, 2018).

[22] 47 U.S.C. § 615a-1(f)(1).

[23] Alabama Districts' Petition at 37 n.72 (citing H.R. Rep. No. 110-442, at 11 (2007)).

[24] H.R. Rep. No. 110-442, at 9-12 (2007).

obviously expresses a legislative concern that "some state and local governments might impose [fees on VoIP services] at a rate higher than those charged on other telephone services."[25] The discussion assumes that, because wireline and wireless 911 fees are imposed in a similar fashion, VoIP charges should follow suit.[26] However, as this proceeding has brought into plain view, in many cases VoIP charges *are* assessed differently than wireline and wireless fees. Indeed, the Alabama Districts' argument admits that their interpretation of the relevant state statute "require[s] IP-enabled customers to pay an E911 fee for *every telephone number* capable of accessing the public switched telephone network while customers with local exchange service [are] required to pay a fee based on the *number of access lines* provided by their service."[27] That is precisely why the Alabama Districts' interpretation of 47 U.S.C. § 615a-1(f)(1) results in much higher total 911 charges being imposed on VoIP services, contrary to the clear congressional desire for parity between VoIP and other telecommunications services.

The Alabama Districts know that the preemptive effect of § 615a-1(f)(1) is a major problem for them, so they argue that the preemption issue is not before the Commission. That is not so.

---

[25] *Id.* at 11.

[26] *Id.*

[27] Alabama Districts' Petition at 40 (emphasis added). "Access lines" in this context is generally understood to be defined as the number of calls that can simultaneously access 911—i.e., if a TDM circuit has 23 voice channels, 911 fees would be charged on 23 access lines. *See Madison Cty. Commc'ns Dist. v. BellSouth Telecomm., Inc.*, No. 5:06-cv-01786-CLS, 2009 WL 9087783, at *7 (N.D. Ala. Mar. 31, 2009) ("This court's careful review . . . demonstrates that the commonly accepted definition of term [sic] 'exchange access line' . . . refers to all *voice pathways* capable of *accessing local exchange service*."); *id*. at 3 ("Primary Rate ISDN service provides the capability of 23 simultaneous conversations for each physical exchange line.").

First, as an initial matter, BellSouth moved for two issues to be referred—one of which was "[w]hether 47 U.S.C. § 615a-1(f)(1) preempts Ala. Code § 11-98-5.1(c) insofar as it requires customers of VoIP or similar services to pay a charge that exceeds the 911 charges applicable to the same class of subscribers to traditional voice services."[28] The motion was granted without exception.[29] While the Alabama Districts note the court's statement that Congress has "precluded charges on VoIP services from exceeding the charges on traditional services,"[30] nowhere did the court indicate that it intended to limit the scope of relief granted. Indeed, the court's statement underscored BellSouth's interpretation of the relevant statute, which the Alabama Districts continue to dispute.

Second, even if the district court had no intention of referring the preemption issue, there is no need for the Commission to consider only those issues that were referred to it. The Commission's rules clearly state that "[t]he Commission may . . . on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."[31] If the volume of lawsuits brought by local jurisdictions under Schneider's bogus litigation theory has created anything other than a potential windfall for Schneider, it is uncertainty: uncertainty about the consumer burden associated with a misreading of 47 U.S.C. § 615a-1(f)(1) and uncertainty about the extent and cost of future litigation associated with this issue. The Alabama Districts' petition highlights that this is a live, and hotly contested, controversy. The Commission can and

[28] *BellSouth's Motion for Primary Jurisdiction Referral and Stay* [Docket No. 36], Case 2:15-cv-00765 (N.D. Ala) (filed May 18, 2017).

[29] Primary Jurisdiction Referral at 14.

[30] Primary Jurisdiction Referral at 7.

[31] 47 C.F.R. § 1.2(a).

should resolve this controversy by addressing the preemption issue, and it is well within its rights to do so.

Finally, the Alabama Districts argue that the courts, rather than the Commission, are "better suited . . . to resolve preemption issues."[32] They then cite several cases to suggest that preemption decisions are not appropriate for federal agencies.[33] Even if the Commission accepts that argument, the question here is not solely whether the Supremacy Clause applies but, more importantly, how to correctly interpret the relevant federal statute. On that question, the courts have been clear—they routinely grant *Chevron* deference and hold the Commission's interpretation to be lawful so long as it is reasonable.[34] Any state law contrary to the Commission's valid interpretation of 47 U.S.C. § 615a-1(f)(1) would therefore necessarily be preempted.

C. The Customer's Order Should Determine Whether a Service Is Interconnected VoIP.

1. The customer's order, not the demarcation point, should determine whether a service is interconnected VoIP.

If the Commission chooses not to declare that state statutes imposing higher fees on interconnected VoIP services are preempted, it should, at a minimum, find that a customer's order determines whether a service is classified as interconnected VoIP.

---

[32] Alabama Districts' Petition at 23.

[33] *See id.* at n.37.

[34] *See Glob. Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 55 (2007) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)) ("In our view the FCC's . . . determination is a reasonable one; hence it is lawful.").

BellSouth correctly observes that "[t]he Commission's demarcation point rules were adopted years before the interconnected VoIP definition [and] were never intended to be used to classify the kind of service a customer purchases."[35] The Alabama Districts' arguments regarding the significance of the network demarcation point are therefore misplaced. The location of the demarcation point has no bearing on the service that is delivered to the customer.

Indeed, the demarcation point generally has little to do with BellSouth and the Alabama Districts' positions on the various types of services at issue. They agree that where a TDM voice service is delivered to the customer, it is not magically converted to interconnected VoIP simply because that service terminates to IP-enabled equipment.[36] They agree that where a TDM voice service is delivered to the customer, that service does not constitute interconnected VoIP simply because it is transmitted in IP over the last mile.[37] And they agree that where an IP broadband service is delivered to the customer, the associated voice service remains interconnected VoIP, even though the customer chooses to convert that service to TDM.[38]

So, where is the disagreement? The Alabama Districts contend that "any service that terminates a voice transmission in IP format in equipment on a customer's or building-owner's

---

[35] BellSouth Petition at 17; *see also* BellSouth Petition at 17-19 (explaining that whether a service is VoIP is irrelevant to the ability for a customer to install inside wiring and that demarcation points vary from building-to-building and are unrelated to the service provided to the customer).

[36] *See* BellSouth Petition at 8; Alabama Districts' Petition at 9-10 (stating that the parties agree that scenarios 1 and 2 depict voice services that are not VoIP services).

[37] *See* Bellsouth Petition at 9; Alabama Districts' Petition at 10-11 (stating that the parties agree that scenarios 3a, 3b and 4a depict voice services that are not VoIP services).

[38] *See* Bellsouth Petition at 9; Alabama Districts' Petition at 11 (stating that the parties agree that scenario 4b depicts a voice service that is interconnected VoIP); *see also* BellSouth Petition at 16 (further articulating the differences between scenarios 4a and 4b).

premises constitutes a service that requires the use of IP customer premises equipment [(CPE)] in satisfaction of the Commission's definition of [interconnected VoIP]."[39] To determine whether equipment classifies as CPE, the Alabama Districts rely on the location of that equipment in relation to the demarcation point.[40] However, the demarcation point, and thus whether equipment is classified as CPE, is wholly irrelevant to BellSouth and the Alabama Districts' agreed conclusions about each of the scenarios presented.

The determining factor in each of these scenarios is not whether the service is terminated using IP-enabled equipment on the customer's premises. The Alabama Districts wrongly assert that the mere existence of IP-enabled CPE means it is "required" and that therefore any associated services fit within the Commission's definition of interconnected VoIP.[41] That interpretation is an overly broad view of the term "required." Consider a customer who orders PRI service and has that service delivered to their private branch exchange. IP-enabled CPE is not "required" or necessary for that service. IP-enabled CPE *could* be used to deliver the service, but Windstream could also provide the service without using any IP-enabled equipment at all. Either way, the result is the same: the customer receives PRI service with no IP functionality. Therefore, the determining factor in whether a service is VoIP must be the nature of the service that is delivered to the customer.

If the nature of the service delivered were not the determining factor and the demarcation point controlled, then the location of the demarcation point would have radically different legal

---

[39] Alabama Districts' Petition at 14-15.

[40] Alabama Districts' Petition at 17.

[41] *Id.*; *see also* BellSouth Petition at 19-21 (arguing that just because a TDM service provider or customer may use IP equipment to deploy or enable that service does not mean that the equipment is "required").

and administrative consequences in situations that are otherwise factually identical, including where customers receive the exact same services—indeed, that is precisely the outcome advocated by the Alabama Districts.

Consider, for example, three residents of neighboring apartment buildings. All purchase the exact same service from Windstream: PRI. All are subject to the same technological limitations: 23 simultaneous calls and no IP functionality. However, each has the service delivered in a different way: one is delivered without any use of IP, one is delivered in IP format over the last mile but is converted by Windstream-owned equipment just shy of the demarcation point, and one is delivered in IP format over the last mile but is converted by Windstream-owned equipment on the customer-side of the demarcation point. In the Alabama Districts' view, the first two examples are PRI but the third example is VoIP, even though the service delivered to the customer is the same in all three scenarios (i.e., a PRI signal with no IP functionality). In addition to treating similarly situated customers differently, the Alabama Districts' position is an administrative nightmare—to determine whether a service is interconnected VoIP, one would have to physically examine where the converting equipment is located in relation to the demarcation point.

Because the service that is delivered to the customer will almost always reflect the customer's order (Windstream and its peers are in the business of meeting customer demand), the Commission should determine that the service ordered by the customer determines whether it is classified as interconnected VoIP. This is an administratively feasible solution that would resolve any ambiguity arising from the Alabama Districts' misplaced emphasis on the relevance of the network demarcation point.

2. If a service agreement limits the maximum number of simultaneous calls, then that agreement should control.

For various reasons, Windstream sometimes agrees with its customers to restrict the number of simultaneous calls. This is most often the case where the customer opts to limit the bandwidth available for VoIP calls in favor of additional bandwidth for general internet access or other applications.

Regardless of the specific circumstances involved, the Commission should determine that where a service agreement limits the maximum number of simultaneous calls, and therefore the number of access lines on which such charges may be assessed, the agreement should control.[42] This outcome would preserve the rights of parties to agree to beneficial terms and would also preserve the privity of contract between them.

III. CONCLUSION

For the reasons stated above, the Commission should grant the BellSouth Petition and deny the Alabama Districts' Petition. Granting the Alabama Districts' Petition would exacerbate the diversion of 911 charges and discourage the adoption of VoIP services, contrary to longstanding federal policy. The Commission should find that state statutes imposing higher total charges on interconnected VoIP services than other telecommunications services are preempted under 47 U.S.C. § 615a-1(f)(1). If the Commission chooses not to address the preemption issue, it should find that, for the purposes of 911 charge collection, the customer's order determines whether a service is interconnected VoIP. Furthermore, it should find that, where a service agreement limits the maximum number of simultaneous calls, the agreement controls the number of access lines on which such charges may be assessed.

[42] *See* supra n. 31 (explaining that "access lines" is generally understood to refer to the maximum number of simultaneous 911 calls that can be originated from a subscriber).

Respectfully submitted,

WINDSTREAM SERVICES, LLC

Thomas W. Whitehead
WINDSTREAM SERVICES, LLC
1275 K Street, NW, Suite 350
Washington, DC 20005
(202) 223-7668

March 28, 2019

APPENDIX

RELATED PENDING LITIGATION AGAINST WINDSTREAM AND ITS SUBSIDIARIES

1) *Blount County Emergency Commc'ns Dist., et al. v. Deltacom, LLC*, No. 1:14-cv-368 (E.D. Tenn.)

2) *Hamilton County Emergency Commc'ns Dist., et al. v. Paetec, et al.*, No. 1:11-cv-330 (E.D. Tenn.)

3) *Clayton County, et al. v. EarthLink, Inc., et al.*, No. 17A 00100-4 (Ga. Super. Ct., Gwinnett Cty.)

4) *Clayton County, et al. v. Windstream Commc'ns, LLC, et al.*, No. 1:17-cv-00031-AT (Ga. Super. Ct. Gwinnett Cty.)

5) *Cobb County, et al. v. EarthLink, LLC, et al.*, No. S17G2011 (Ga. Super. Ct.)

6) *Cobb County, et al. v. Network Telephone, LLC, et al.*, No. 1:15 cv 4373 (N.D. Ga.)

7) *County of Beaver v. Verizon Pennsylvania, Inc., et al.*, No. 10237-2016 (Beaver Cty. Ct. of Com. Pls.)

8) *County of Berks v. Verizon Pennsylvania, Inc., et al.*, No. 15-15867 (Berks Cty. Ct. of Com. Pls.)

9) *County of Chester v. AT&T, Inc., et al.*, No. 2015-06910-MJ (Chester Cty. Ct. of Com. Pls.)

10) *County of Cumberland v. Pioneer Telephone, et al.*, No. 2015-04281 (Cumberland Cty. Ct. of Com. Pls.)

11) *County of Dauphin v. Verizon Pennsylvania, Inc.*, et al., No. 2015 CV 5933 MP (Dauphin Cty. Ct. of Com. Pls.)

12) *Delaware County v. Verizon Pennsylvania, Inc., et al.*, No. 2015-004830 (Delaware Cty. Ct. of Com. Pls.)

13) *County of Washington v. Verizon Pennsylvania, Inc., et al.*, No. 2015-4706 (Washington Cty. Ct. of Com. Pls.)

14) *County of Westmoreland v. AT&T Corp., et al.*, No. 2015-05432 (Westmoreland Cty. Ct. of Com. Pls.)

15) *County of York v. AT&T, Corp., et al.*, No. 2015-SU-002732-49 (York Cty. Ct. of Com. Pls.)

16) *County of Bucks v. Verizon Pennsylvania, Inc., et al.*, No. 2016-01028 (Bucks Cty. Ct. of Com. Pls.)

17) *County of Clarion v. Windstream Pennsylvania, Inc., et al.*, No. 364-2016 (Clarion Cty. Ct. of Com. Pls.);

18) *County of Lancaster v. Verizon Pennsylvania, Inc., et al.*, No. CI-15-06600 (Lancaster Cty. Ct. of Com. Pls.)

19) *County of Lebanon v. Verizon Pennsylvania, Inc., et al.*, No. 2016-00998 (Lebanon Cty. Ct. of Com. Pls.)

20) *County of Mercer v. Verizon Pennsylvania, Inc., et al.*, No. 2016-1081 (Mercer Cty. Ct. of Com. Pls.)

21) *County of Somerset v. AT&T Corp., et al.*, No. 571 Civil 2016 (Somerset Cty. Ct. of Com. Pls.)

22) *Phone Recovery Servs., LLC and County of Allegheny v. Verizon Pennsylvania, Inc., et al.*, No. GD-14-021671 (Allegheny Cty. Ct. of Com. Pls.) - *stay granted*

23) *County of Butler v. Centurylink Commc'ns, LLC, et al.*, No. 66 WAP 2017 (Pa. Sup. Ct.)

24) *Phone Recovery Servs., LLC and State of Rhode Island v. Verizon New England, Inc., et al.*, No. 2014-4059 (R.I. Superior Ct., Providence)

25) *Phone Recovery Servs., LLC and Pocahontas County Joint E911 Serv. Bd. v. Windstream Holdings, Inc., et al.*, No. 2761 CVCV126718 (Iowa Dist. Ct., Pocahontas Cty.)

26) *Phone Recovery Servs., LLC and State of New Jersey v. Verizon New Jersey, Inc., et al.*, No. L 2257-13 (N.J. Super. Ct., Mercer Cty.)

27) *Phone Recovery Servs., LLC and State of Florida v. Windstream Commc'ns, LLC, et al.*, No. 2016-CA-002103 (Fla. Cir. Ct., Leon Cty.) - *stay granted*